cuit is reported in 263 F.2d 457, and is appended hereto (App. 1-2). The same action was previously before this Honorable Court on petition for writ of certiorari at No. 834 October Term, 1957, and the proceedings and appendices therein are incorporated herein by reference thereto. In the prior appeal, the Order of the United States District Court for the Western District of Pennsylvania was accompanied by an Opinion and the case is reported in 148 F. Supp. 663; and the Opinion of the United States Court of Appeals for the Third Circuit is reported in 251 F.2d 49.

B. The Order of the United States District Court for the Western District of Pennsylvania, which was the subject of appeal No. 12765, was not accompanied by an Opinion and the case is not reported. The Opinion of the United States Court of Appeals for the Third Circuit is reported in 263 F.2d 458, and is appended hereto (App. 3-5). This same action was previously before the United States Court of Appeals for the Third Circuit on two prior appeals. The Order of the United States District Court for the Western District of Pennsylvania, which was the subject of the first appeal at No. 11499, was accompanied by an Opinion and the case is reported in 125 F. Supp. 596; and the Opinion of the United States Court of Appeals for the Third Circuit is reported in 225 F.2d 245. The Order of the United States District Court for the Western District of Pennsylvania, which was the subject of the second appeal at No. 12052, was accompanied by an Opinion and the case is reported in 19 F.R.D. 238; and the Opinion of the United States Court of Appeals for the Third Circuit is reported in 242 F.2d 379.

JURISDICTION

The judgments sought to be reviewed (App. 2 and App. 5) were dated and entered February 17, 1959.

The Orders of the Court of Appeals denying the Petitions for Rehearing were dated and entered March 16, 1959. Therefore, the time for filing this petition for writ of certiorari expires June 15, 1959.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254 (1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

When a Complaint in Federal Court asserts damages against members of the State judiciary acting in official capacity; with jurisdiction based on the Constitution of the United States, the Civil Rights Acts, and a sum in excess of the jurisdictional amount exclusive of interest and costs; and alleges deprivations by the defendants discriminatorily, arbitrarily and illegally, of plaintiff's federal property, constitutional and civil rights; do not Orders of Court conflict with the Law of the Land and illegally deprive the plaintiff-appellant of his right to due process of law as guaranteed by the Constitution of the United States, when such orders hold that:

(A) the Complaint fails to state a claim upon which relief can be granted;

(B) the defendants are immune from suit;

(C) the plaintiff does not have the right to discovery under Rule 26(a);

(D) the defendants' failure to plead the affirmative defense of immunity under Rule 8(c), did not waive the right to plead it pursuant to Rule 12(h);

(E) the plaintiff cannot have his right, prior to service of a responsive pleading, to amend once as a matter of course under Rule 15(a), without leave of court or consent of the defendants;

(F) the Exhibit to a Complaint, which is evidently relevant, material, pertinent thereto and free of scandal, can summarily be suppressed and impounded, and even when the alleged scandal does not refer to the moving defendants;

(G) the mandate of the Court of Appeals prevents further proceedings in the District Court, which proceedings are allowable under the Federal Rules of Civil Procedure and the applicable law, even on issues and matters that are not within the compass of the mandate, in the course of which proceedings, defendants' attachment execution for costs is allowable against plaintiff's property;

(H) the jurisdiction of the Court of Appeals is not exclusively appellate, and it can usurp the power and assume the function of the District Court whimsically and capriciously, particularly by "reviewing" issues which were not adjudicated by the District Court;

(I) a case can volley back and forth between the District Court and the Court of Appeals with the result that the case is preliminarily dismissed on unsupported and insupportable motion in advance of plaintiff's right to be heard, without a true adjudication of any of the issues involved?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States involved herein are the Fifth and Fourteenth Amendments, the pertinent portions of which (U.S.C.A., Constitution, Amendments 1 to 13, p. 172 and Amendment 14, p. 2), are as follows:

"Amendment V. Due Process of Law . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; . . .".

"Amendment XIV. Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws".

STATUTES INVOLVED

The statues involved herein are known as the Civil Rights Acts. The particular statute involved is derived from the Act of April 20, 1871, C. 22, sec. 1, 17 Stat. 13, sec. 1983 of Title 42 of the United States Code, now R.S. Section 1979, the pertinent portion of which is as follows:

"Civil Action for Deprivation of Rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

STATEMENT OF THE CASE

The petitioner, Paul Ginsburg, is a citizen by birth and a practicing lawyer of Pittsburgh, Pennsylvania; a member in good standing of the Bar of State and Federal Courts in Pennsylvania and of this Honorable Court; and a member in good standing of The Allegheny County Bar Association (and past Officer thereof), the Pennsylvania State and American Bar Associations.

Petitioner instituted two suits in the District Court for damages against the respondents individually and jointly as Justices of the Supreme Court of Pennsylvania. Jurisdiction of the suits was based on the Fourteenth Amendment to the Constitution of the United States, the Civil Rights Acts, and a sum in excess of the jurisdictional amount exclusive of interest and costs. Alleged are deprivations by the defendants discriminatorily, arbitrarily and illegally, of plaintiff's federal property, constitutional and civil rights.

Although your petitioner contends that the actions of the respondents in the State Court, which impelled the petitioner to bring the instant suits, were illegal, that is not at all in issue herein. *The point is that regardless of the legality or illegality of their actions, they had the effect of depriving and did deprive petitioner of federal constitutional and civil rights. It is those deprivations which are the subject of these suits, as alleged.*

A. In the case involving the one judgment to be reviewed (App. 2), Appeal No. 12764, that action was filed in the District Court at No. 14240 and was previously before this Court at No. 834 October Term, 1957, and all of the proceedings and appendices therein are

incorporated herein by reference thereto. The statement of the case therein (Petition, pp. 5-9), incorporated herein, gives the background of the action and details the pleadings, repetition of which is unnecessary because the hereinabove second paragraph of the instant Statement of the Case makes it manifest that under Notice Pleadings the Complaint is sufficient.

On June 23, 1958, the date of the denial of the last pleading filed in said prior certiorari proceeding, your petitioner lodged in the District Court his motion to vacate the Order dismissing the Complaint and for other relief (R. 6a-8a), to which there was an Answer (R. 9a), followed by a Reply (R. 10a-11a).

The said motion contained authorities on every point in support thereof. The said answer failed to deny any averments of the motion. The said reply showed that the Court had no legal alternative but to grant the motion. Nonetheless the District Court entered an Order (R. 11a) denying the motion.

The denied motion was founded on sound legal propositions. Its *first averment* showed that District Judge McIlvaine's Order of December 18, 1956, granting defendants' Motion to Dismiss Under Rule 12, was based solely on the ground that "the doctrine of judicial immunity from suits irrespective of the Civil Rights Act" is a complete defense to the instant action; and that the said Order was erroneous because the District Judge was powerless to grant the said defense that had been waived by the defendants, and, regardless, the defendants do not have immunity. The *second averment* showed that, on appeal, the Order was affirmed, but on a different ground, in effect reversing

the holding of immunity. The affirmance was based upon failure of the Complaint to state a claim on which relief could be granted aside from immunity, an issue which was not properly before the Court of Appeals for review and which it was without jurisdiction to adjudicate, because there had not been an adjudication in the District Court on that issue. The *third averment* showed that denial of certiorari did not imply approval of the decisions below or the supporting opinions, and that now the plaintiff is entitled to a Hearing in the District Court on the issue of whether the Complaint states a claim upon which relief can be granted.

On appeal from the Order denying the said motion, the Court of Appeals affirmed (App. 2), "under the principle stated in *Butcher & Sherrerd v. Welsh*, 206 F. 2d 259, 262 (3rd Cir. 1953)" (App. 2). But that case is not applicable herein, except to dispel the erroneous notion below that there can be only one appeal or one mandate to a case, because that was a mandamus proceeding to vacate an order granting a new trial and further proceedings *after the Court of Appeals had returned three mandates affirming judgment against the defendant.* Incidentally, the subject of each mandate therein was the same, and each involved an issue over which that *reviewing court* had jurisdiction. The Petition for Rehearing (pp. 3-4) cited authorities which exposed the ostrich-like applicability of *Butcher & Sherrerd v. Welsh,* and revealed the conflicting arbitrariness of the discriminatory affirmance. Hence this petition.

B. In the case involving the other judgment to be reviewed (App. 5), Appeal No. 12765, that action was

then before the Court of Appeals for the third time. It was filed in the District Court at No. 12643, and was first appealed to the Court of Appeals at No. 11499 from an Order of dismissal entered by Chief District Judge Gourley. Although said Order included refusal of a motion to strike the appendix to the Complaint, the Court of Appeals preliminarily granted such motion to strike and suppress erroneously. After affirmance by the Court of Appeals, petitioner sought leave therein to file an Amended Complaint, which was denied.

After the foregoing and other proceedings in that appeal, your petitioner presented in the District Court a Motion for Leave to File Amended Complaint. In the original Complaint the only defendants named were the then Chief Justice of the Supreme Court of Pennsylvania (Horace Stern) and the Prothonotary (Patrick N. Bolsinger) of that Court's Western District. The Amended Complaint named Horace Stern, Charles Alvin Jones, John C. Bell, Jr., Thomas McKeen Chidsey, Michael A. Musmanno and John C. Arnold as defendants, individually and jointly as Justices of the Supreme Court of Pennsylvania. That is why, having added the other Justices as defendants and dropped Bolsinger, the instant petition for certiorari is so captioned.

Pursuant to Rule 15(a), petitioner had the absolute right to have the Amended Complaint filed without leave of Court, but the Clerk had refused to file it. Nevertheless, Chief Judge Gourley refused to order the Amended Complaint filed solely for the reason that the defendants were immune from suit. He specifically held, however, that except for the question of immunity, the amended

complaint states a claim upon which relief can be granted, and particularized this holding upon clarification. On appeal from Hon. Wallace S. Gourley's Order refusing leave to file the amended complaint at No. 12052, the Court of Appeals affirmed.

After that second appeal your petitioner had the right to proceed further in this Honorable Court under 28 U.S.C., secs. 1254 (1) or 1651(a), or back in the District Court. However, he and counsel for the defendants agreed to await the determination of the other case referred to in section A of this Statement, between the same parties and involving the same issue of lack of immunity. Yet, while the other action was still pending and undetermined, the defendants proceeded *ex parte*, on August 13, 1958, with a Praecipe for Writ of Attachment Execution (R. 8a), and had the U. S. Marshal serve a Writ of Attachment Execution for $335.30 (R. 9a) and Interrogatories to Garnishee (R. 10a) upon the Mellon National Bank and Trust Company, as a result of which the bank blocked one of petitioner's bank accounts in the sum of $500.00 as is evident from the Answers to Interrogatories (R. 11a-12a). Not only did the defendants fail to give petitioner notice of taxing any costs, but they have never attempted to establish that their costs amount to $335.30 or any other amount.

On August 26, 1958, three documents were filed for plaintiff in the District Court: (1) Notice of Taking Deposition (R. 13a) of defendant Horace Stern, and defendants made a motion that it be not taken (R. 14a-15a); (2) Motion to Vacate Order Refusing Motion for Leave to File Amended Complaint and for Other Relief

(R. 15a-16a), to which defendants made Answer (R. 17a-18a); and (3) Motion to Vacate Writ of Attachment Execution and to Dissolve Attachment (R. 19a-20a), to which defendants made Answer (R. 20a-21a). Chief District Judge Gourley entered three orders (R. 22a) unaccompanied by an Opinion on September 29, 1958, adjudicating all issues adversely to plaintiff, from which the third appeal was taken at No. 12765.

The Court of Appeals affirmed (App. 5), as in the other judgment sought to be reviewed herein: "Since the order of July 19, 1956, denying plaintiff leave to amend was affirmed by this Court in 242 F. 2d 379 and a mandate thereon had issued, the district court properly refused to vacate the July 19, 1956, order under the principle stated in *Butcher & Sherrerd v. Welsh,* 206 F. 2d 259, 262 (3d Cir. 1953). In the circumstances the district court was right in refusing to vacate the writ of attachment for costs and in preventing plaintiff from proceeding to take the noticed deposition" (App. 5).

The denied Petition for Rehearing reveals that the misguided blindness of the illegal obedience to "the principle" stated in *Butcher & Sherrerd v. Welsh,* is exceeded only by the preposterous reverence for the sanctity of a pierced mandate. Hence this petition.

REASONS FOR ALLOWANCE OF THE WRIT

On May 18, 1959, the opinions of this Honorable Court were entered in the case of *Dick, Petitioner, v. New York Life Insurance Co.*, 79 S. Ct. 921, *which opinions chart the certiorari course.* Mr. Chief Justice Warren delivered the opinion of the Court, and Mr. Justice Frankfurter the dissenting opinion. **For purposes herein it does not matter which opinion is the correct one in that case, because both opinions support petitioner's right to certiorari in this case.**

Both the Evarts Act and the "Judges' Bill", cited in Mr. Justice Frankfurter's dissent, even authorize and attest the ned for review of the judgments in the instant cases in order, *inter alia*, to secure and preserve uniformity of decision.

A. The Complaints Are Sufficient.

It is elementary that on a Motion to Dismiss, all allegations of the Complaint must be taken as admitted to be true and all inferences therefrom must be construed most favorably towards the plaintiff's case. In the case of *Publicity Building Realty Corp., et al., v. Hannegan, et al.*, 139 F. 2d 583, the Court stated (p. 586): "This Court has repeatedly said that a motion to dismiss a complaint should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim"; and (p. 587): "An attempt by this Court to rule upon these issues of law, which have not been tried below, and which require the assumption of a factual situation as favorable to the appellants as can reasonably be conceived in view of

their pleadings, would not be justified". Since jurisdiction herein is based upon the Fourteenth Amendment and the Civil Rights Acts, no Court under Notice Pleadings can legally presume to declare that the plaintiff has not alleged a deprivation of every right guaranteed by the Fourteenth Amendment and the Civil Rights Acts.

It is obvious that the Complaint in the one case and the Amended Complaint in the other case both fully comply with Rule 8(a) *Claims for Relief,* which provides that "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled". Therefore, pursuant to Notice Pleadings, there cannot be any legal denial of sufficiency.

Have Not The Lower Courts Erroneously Concluded That Petitioner Has No Federal Constitutional And Civil Rights?

The numerous rights of which petitioner has been conspiratorily, discriminatorily and illegally deprived by respondents include, but are not limited to, his right to earn a living and secure compensation earned for services rendered in his chosen profession, the right to protect and enforce the said rights in accordance with established forms of law and procedure and with due process of law, the right to secure and protect his property including his business and profession, the right to a day in Court and to be heard in advance of judgment, the right to protect and defend his personal and professional

standing. These rights are common to all, not peculiar to petitioner; and they are guaranteed. *Wilson, Inc. v. F.C.C.*, 170 F. 2d 793 (1948); *Sorenson v. Jacobson*, 232 P. 2d 332 (1951); *Carroll v. Local No. 269 I.B.E.W.*, 31 A.2d 223 (1943); *Lasdon v. Hallihan*, 36 NE 2d 227 (1941); *People v. Love*, 298 Ill. 304; *Ackerman v. U.S.*, C.A. Tex. (1949), 178 F. 2d 983, opinion followed in 179 F. 2d 236, judgment affirmed 71 S. Ct. 209, 340 U.S. 193, 95 L. Ed. 207; *Hanson v. Union Pac. R. Co.*, 71 N. W. 2d 526 (1955); *Bomar v. Keyes*, 162 F. 2d 136 (1947), certiorari denied 332 U.S. 825, rehearing denied 332 U.S. 845.

B. The Respondents Do Not Have Immunity.

Under the law of the instant Circuit and the Law of the Land, the respondents do not have immunity herein. *Picking v. Pa. R. Co.*, 151 F. 2d 240 (1945), cited with approval in *McShane v. Moldovan*, 172 F. 2d 1016 (1949), in *Cooper v. Hutchinson*, 184 F. 2d 119 (1950) and in *Tenney v. Brandhove*, 341 U.S. 367 (1951). This law has, of course, been upheld in the most recent pronouncement of this Honorable Court in *Cooper, et al., v. Aaron, et al.*, 358 U.S. 1 (1958). *Cooper v. Hutchinson, supra*, also cited with approval *Valle v. Stengel*, 176 F. 2d 697 (1949). *McShane v. Moldovan, supra*, relies upon *Screws v. United States*, 325 U.S. 108, reaffirming *United States v. Classic*, 313 U.S. 299, all of which leave no doubt about the lack of immunity. Incidentally, in *Cooper v. Hutchinson, supra*, Circuit Judge Goodrich of the Court of Appeals stated (p. 124): "But appellants say that their right to assert a claim under Section 1 of the Civil Rights Act of 1871 is not dependent upon the prior pursuit of relief under state law. That is

correct. *Lane v. Wilson*, 1939, 307 U.S. 268, 274-275, 59 S. Ct. 872, 83 L. Ed. 1281. We are not here governed by the rule of the habeas corpus cases to the effect that the state law processes must be exhausted before there can be resort to a federal court".

Actually, the dismissal in both cases was solely on the ground of immunity. District Judge John W. McIlvaine refused to consider any of the motions properly before him in the action on appeal at No. 12764, because of his personal opinion on immunity. Chief District Judge Wallace L. Gourley held that the Amended Complaint in the action on appeal at No. 12765 stated a claim on which relief can be granted aside from the question of immunity, yet holding that the actions of the defendants were "violative of basic concepts of justice". Because of the refusal of the Court of Appeals to make a single affirmance on the ground of immunity, having expressly refrained from adjudicating that lone issue before it on the prior appeals, has it not in effect reversed the dismissals on the ground of immunity and then gone on to "adjudicate" matters not procedurally before it?

Therefore, as a matter of law, the respondents must necessarily find themselves in the distressing position, where they must be returned to the District Court without immunity and subject to Complaints that state claims on which relief can be granted; where they must face the facts, under the Constitution and laws, with no more technical escapes from their liabilities imposed by law.

C. The Decisions Denying Petitioner His Right To Discovery Were Erroneous.

It is elementary that a plaintiff is entitled to take depositions under Rule 26(a) for purposes of discovery. This right is fundamental. How then can the District Judges justify their consideration of motions to dismiss, let alone their granting them, in advance of the exercise of plaintiff's right to take depositions? How then can the Court of Appeals justify its sanctioning of such departures from the accepted and usual course of judicial proceedings?

D. The Respondents Waived The Right To The Affirmative Defense of Immunity.

By their failure to plead the affirmative defense of immunity under Rule 8(c), the respondents in both cases have waived it pursuant to Rule 12(h). In the case of *Van Sant v. American Express Co.*, 169 F. 2d 355 (1948), the Court of Appeals held that affirmative defenses not pleaded under Rule 8(c) are waived pursuant to Rule 12(h) and then are not subsequently allowable by amendment.

Subdivision (h) of Rule 12 intends that any defense permitted to be made by motion at option of defendant, and which is not raised either by motion or by answer, will be deemed to have been waived. *Phillips v. Baker*, 121 F. 2d 752, 9 CCA (1941), certiorari denied 314 U. S. 688.

E. The Refusal To Permit Petitioner His Right To Amend Under Rule 15(a) Was Clearly Erroneous.

It is apparent from the Record that a responsive pleading has never been served or filed for the defendants. It is elementary that Rule 15 (a) guarantees that a plaintiff may amend once as a matter of right without leave of court or consent of defendants at any time prior to service of a responsive pleading. Therefore, Chief District Judge Gourley was duty bound to order the aforesaid Amended Complaint filed, because District Judges are bound by the Federal Rules of Civil Procedure as by an Act of Congress. *Foltz v. Moore-McCormack Lines, Inc.*, 19 F. R. D. 301 (Cf. 28 U.S.C., sec. 2072).

In *Saper v. Hague*, 186 F. 2d 592, 2 CCA (1951), the Court held that even a motion to conform a pleading to proof may be made at any time, even after judgment. In *Du Pont v. U. S. Camo Corp., et al.*, 19 F.R.D. 495 (1956), W.D. Mo., the Court held that there is no limitation on time to amend, only due diligence being required; and generally leave is granted freely where justice requires and particularly when the amendment is directed to clarification of the issues. In *Copeland v. General Motors Corp.*, 199 F. 2d 566, 5 CCA (1952), the Court held that a party may amend freely to secure a determination on merits rather than on technicalities; and there is no laches where amendment is tendered shortly after awaited decision of issues by the Supreme Court.

F. The Suppression Of The Exhibit To A Complaint By The Court of Appeals Was Unauthorized and Contrary To Applicable Law.

The original Complaint in the action described in section B of the Statement of the Case, contained an Exhibit which Chief District Judge Gourley refused to strike. The said Exhibit was a copy of a Petition presented in the Pennsylvania Supreme Court which then Chief Justice Horace Stern ordered the Prothonotary not to file, and then later ordered said Petition dismissed through an off-the-record Order in that Court of record. The Petition showed that your petitioner was denied the right to prosecute a *prima facie* disbarment Complaint against Attorney Louis Caplan and others, which prosecution in effect constituted petitioner's defense to unwarranted, untrue, defamatory and illegal attacks upon petitioner's personal and professional standing and his property right therein.

The said Exhibit is relevant, material and pertinent to the Complaint and free of any scandalous matter. Nevertheless the Court of Appeals, on motion of defendants who were not respondents therein, ordered it impounded.

G. It Was Error To Deny Petitioner The Right To Proceed On Matters Not Within The Compass Of The Mandates; And To Allow Defendants' Attachment Execution Against Petitioner's Property For Costs, Pending The Proceedings.

In opposition to the "principle" stated in *Butcher & Sherrerd v. Welsh*, the applicable legal authorities establish petitioner's right to have proceeded as he did.

The mandate from the reviewing court is controlling only as to such matters as are within the compass of such mandate, and the lower court is still free to act as to questions not within the compass of the mandate. *Carpenter v. Rohm & Haas Co., Inc.,* 3rd Cir. 1950, 180 F.2d 749, affirming D.C. Del., 9 F.R.D. 535, citing with approval *Maddix v. Dize,* 61 F. Supp. 946. Furthermore, it is not necessary that a preliminary petition be made to the reviewing court to reopen a judgment below which was affirmed on appeal. *Von Wedel v. McGrath,* 3rd Cir. 1952, 194 F.2d 1013, affirming D.C.D. N.J., 100 F. Supp. 434, citing *Perlman v. 322 West Seventy-Second Street Co.,* 2 Cir. 1942, 127 F.2d 716. The Court's affirmance in *Von Wedel v. McGrath, supra,* held also (100 F. Supp. 434, 436) that "where the legal effect of the affirmance is not to be disturbed, a judgment may be reopened (In Re Harbor Stores Corporation, D.C.S.D. N. Y. 1940, 33 F. Supp. 360)", and that "It would seem proper, therefore, to permit an amendment even after dismissal and affirmance on appeal if the circumstances so warrant (*Feuerstein v. Zukor,* 2 Cir. 1949, 174 F.2d 371)".

The misapplication of the case of *Butcher & Sherrerd v. Welsh, supra,* bearing an implication of support for affirmance by the Court of Appeals, is based at best upon a misconstruction of the source of the District Court's power and duty, which actually lies in the Federal Rules of Civil Procedure by which the Judges are bound as by an Act of Congress. *Therefore, a mandate as such cannot delimit, disaffect or change the powers and duties of District Judges.*

The issues sought to be adjudicated were not within the compass of the mandates. When the Court of

Appeals at first *refrained* from adjudicating the issue of lack of immunity, then repeatedly *declined* to adjudicate that issue in both cases, it was simply failing to adjudicate the only issue properly or legally before it in the prior appeals. Actually its adjudications on the issue of sufficiency were and are a legal nullity. Furthermore, the Court's decline and refraint to affirm on the immunity issue in effect constituted a reversal of the District Court. Therefore, the issuance of the mandates could not legally have prohibited the District Court from proceeding with the cases pursuant to the Federal Rules of Civil Procedure.

It is elementary that until an action is finally determined, none of the parties can collect costs, and it is apparent on the record that these cases are pending and undetermined. Nevertheless Chief Judge Gourley allowed defendants' execution attachment against petitioner's bank accounts for costs in the action described in section B of the Statement of the Case, which was sanctioned by the Court of Appeals. The attachment was based on the fictional premise that the action is not pending. Actually, the respondents were asking the lower Courts to overlook and disregard the filing of all pleadings which were filed and subject to consideration; to pretend that the Orders thereon were never really entered; to make believe that the arguments below were not really taking place; and to decline to make decisions which the Judges were bound to enter,—all being utterly fantastic. It is respectfully submitted that this Honorable Court is fully cognizant and aware of the Record before it on review.

H. The Jurisdiction of The Court of Appeals Is Exclusively Appellate.

It is not the function of the Court of Appeals to assume the powers and function of the District Court. The function of the appellate court is limited to considering and rectifying errors of the lower Court. *Ralston Purina Co. v. Novak,* 111 F. 2d 631 (1940). *Stephenson v. Equitable Life Assur. Soc. of U. S.,* 97 F. 2d 406 (1937). See also *N.A.A.C.P. v. Alabama,* 357 U. S. 449, wherein Mr. Justice Harlan (p. 466) stated, "Petitioner has never received a hearing on the merits of the ouster suit, and we do not consider these questions properly here". *It is respectfully submitted that when this Supreme Court recognizes and submits to the limitations upon its reviewing powers, certainly the Court of Appeals should do so.* The issue of sufficiency of the complaints was not properly within the compass of the mandates, and petitioner should not have been denied his constitutional, procedural right to be heard on that issue; *which at any rate is not the subject of review prior to trial.*

Therefore, in the instant cases, the Court of Appeals was powerless to adjudicate any issue except lack of immunity, and thereupon to issue mandates providing only that the cases proceed in the District Court pursuant to the Federal Rules of Civil Procedure.

1. Review and Reversal are Required to Prevent Such Dismissals Without Legal Adjudications.

What has happened in the instant actions, has happened in other cases in the lower Courts,—decision after decision, without a single legal adjudication on procedural and substantive issues that are properly before

the Court. Consequently, just as your petitioner was deprived of due process of law by the respondents in violation of the Fourteenth Amendment, he has been deprived of due process of law in the Courts below in violation of the Fifth Amendment.

The Court of Appeals is supposed to afford a litigant his right to a second chance. But the Record herein makes it self evident that your petitioner never obtained his second chance therein. *Therefore, as an additional ground for certiorari*, it is respectfully submitted that this Court exercise its supervisory power over the lower Courts as a substitute second chance.

CONCLUSION

Judges of the Circuit Courts, so inclined, should be made less confident that they can dispense "justice" as they please, denying litigants a second chance, *without fear of review*. This Court's exercise of its supervisory power could cure that National problem. In order to restrict, if not eliminate this disregard of the honor of the fair administration of justice in the Federal system, this petition for writs of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG

Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,764

PAUL GINSBURG, *Appellant*

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania

Appeal From the United States District Court for the Western District of Pennsylvania.

Argued February 2, 1959

Before GOODRICH and STALEY, *Circuit Judges*, and STEEL, *District Judge*.

OPINION OF THE COURT

PER CURIAM (Filed February 17, 1959)

This is an appeal from an order of the District Court for the Western District of Pennsylvania. The chronology of the case follows.

On February 2, 1956, plaintiff instituted a civil action against the Justices of the Supreme Court of Pennsylvania individually and jointly, charging them with a violation of the Civil Rights Acts, 42 U.S.C.A. §§ 1983, 1985, 1986 (1957). On motion the district court on December 18, 1956, dismissed the complaint, holding that it failed to state a claim upon which relief could be granted, on the ground that defendants, as judges acting in their official capacity, were immune from liability.

148 F. Supp. 663 (W.D. Pa. 1956). During the pendency of plaintiff's appeal from the district court judgment, this Court denied his motion to remand. The judgment of the district court subsequently was affirmed. 251 F.2d 49 (1958). This Court, declining to rule on the immunity point, held nevertheless that plaintiff's complaint failed to state a claim upon which relief could be granted. *Id.* at 50. A petition for rehearing was denied. *Id.* at 49. On April 14, 1958, the Supreme Court denied certiorari, 356 U.S. 932; and on April 21, 1958, this Court's mandate was issued to the district court. Plaintiff's petition for rehearing was denied by the Supreme Court on May 5, 1958, 356 U.S. 954, as was his motion to remand on June 23, 1958, 357 U.S. 924.

On the same date plaintiff filed in the district court a motion to vacate its order dismissing the complaint and for other relief. The plaintiff now appeals from the district court's order denying the motion.

Since the order of December 18, 1956, dismissing the complaint which plaintiff sought to have the district court vacate was affirmed by this Court in 251 F.2d 49 and a mandate of affirmance had been issued thereon, the district court was right in refusing to vacate the order of December 18, 1956, under the principle stated in *Butcher & Sherrerd v. Welsh*, 206 F.2d 259, 262 (3rd Cir. 1953).

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,765

PAUL GINSBURG, *Appellant*

v.

HORACE STERN and PATRICK N. BOLINGER

Appeal From the United States District Court for the Western District of Pennsylvania.

Argued February 2, 1959
Before GOODRICH and STALEY, *Circuit Judges*, and STEEL, *District Judge*.

OPINION OF THE COURT

(Filed February 17, 1959)

PER CURIAM

This is an appeal from three orders of the District Court for the Western District of Pennsylvania. The chronology of this case follows.

On August 31, 1954, plaintiff instituted a civil action against the then Chief Justice and the Prothonotary of the Supreme Court of Pennsylvania, charging them with a violation of the Civil Rights Acts, 42 U.S.C.A. §§ 1983, 1985, 1986 (1957). On motion the district court dismissed the complaint, holding that it failed to state a claim upon which relief could be granted, on the ground that the defendants were immune from liability and on the further ground that the complaint failed to disclose the denial to plaintiff of any rights under the Constitution or laws

of the United States or under Pennsylvania law or the Rules of its Supreme Court. 125 F. Supp. 596, 600-03 (W.D. Pa. 1954). This Court, sitting en banc, affirmed on the ground that the plaintiff had "not stated a cause of action cognizable in a United States District Court under the Civil Rights Acts . . . or any other statute or rule of law." 225 F.d 245 (1955). The opinion expressly declined to rule on the immunity ground. *Ibid.* Before issuing its mandate this Court denied a motion to amend the complaint, a petition for rehearing, 225 F.2d 245, and a motion for leave to file a supplementary petition for rehearing. Plaintiff then moved in the district court for leave to file an amended complaint. On July 19, 1956, the district court issued an order refusing to grant leave to amend and entered a judgment. 19 F.R.D. 238 (W.D. Pa. 1956). On appeal this Court affirmed the denial but vacated the district court's judgment, on the ground that the original judgment for the original defendants remained intact. 242 F.2d 379 (1957). A petition for rehearing was denied. *Ibid.*

In both appeals costs were taxed against the plaintiff, in total $315.30. On August 13, 1958, a writ of attachment execution was issued by the defendants for the collection of the costs. Plaintiff then (1) moved to vacate the writ of attachment, (2) moved to vacate the July 19, 1956, order of the district court which had refused his motion for leave to file an amended complaint and (3) gave notice of intention to take the deposition of one of the defendants. After answer, counter-motion and argument the district court by order denied both of plaintiff's motions and refused to permit the taking of the proposed deposition. From these orders the plaintiff now appeals.

Since the order of July 19, 1956, denying plaintiff leave to amend was affirmed by this Court in 242 F.2d 379 and a mandate thereon had issued, the district court properly refused to vacate the July 19, 1956, order under the principle stated in *Butcher & Sherrerd v. Welsh*, 206 F.2d 259, 262 (3d Cir. 1953). In the circumstances the district court was right in refusing to vacate the writ of attachment for costs and in preventing plaintiff from proceeding to take the noticed deposition.

The judgment of the district court will be affirmed. In addition, plaintiff's motion to remand, filed in this Court on January 12, 1959, will be denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.